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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-741

JESSE KETCHUM, M.D., *Petitioner,*

v.

STATE OF NEW YORK, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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JESSE KETCHUM, M.D., *Petitioner,*

v.

STATE OF NEW YORK, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner, Jesse Ketchum, M.D., respectfully requests this Court to issue a writ of certiorari to the New York Court of Appeals to review its judgment in the above-captioned case.

CITATION TO OPINIONS BELOW

The memorandum opinion of the New York Court of Appeals, issued October 23, 1974, and not yet reported, is set out in the Appendix, *infra,* at 1a.

The memorandum of the Supreme Court of New York, Appellate Division, Fourth Department, dated

June 27, 1974, is reported as *People* v. *Ketchum*, — App. Div. 2d —, 358 N.Y.S.2d 353 (4th Dep't 1974), and set out in the Appendix, *infra*, at 2a.

The unreported judgment of the Supreme Court of New York, Erie County, dated October 26, 1973, entered on a verdict of guilty, is set out in the Appendix, *infra*, at 2a.

JURISDICTION

The Memorandum opinion of the New York Court of Appeals was issued and filed October 23, 1974, and constitutes the judgment of that Court (App. 1a). No request for rehearing was made.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2) & (3). Cases supporting jurisdiction include: *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Webb* v. *Texas*, 409 U.S. 95 (1972) (per curiam); *Rabe* v. *Washington*, 405 U.S. 313 (1972) (per curiam).

QUESTIONS PRESENTED FOR REVIEW

I. Whether Dr. Ketchum was denied due process, in violation of the Fourteenth Amendment, where the criminally negligent homicide statute, N.Y. PENAL CODE §§ 15.05, 125.10, never before applied in a medical context, and the indictment, provided neither notice of the conduct charged nor specific pre-existing professional standards, and there was no evidence on two essential elements of the offense?

II. Whether Dr. Ketchum was denied a fair trial in violation of the Fourteenth Amendment where his prosecution for criminal negligence in performing a legal abortion resulting in death was permeated with

improprieties and error which even the Court of Appeals recognized as including "grievous misconduct" that was to be "strongly condemn[ed]"?

STATUTES INVOLVED

N. Y. PENAL CODE § 125.10, at 224 (McKinney 1967), provides:

> "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

N. Y. PENAL CODE § 15.05, at 21 (McKinney Supp. 1973-74), provides in pertinent part:

> "4. 'Criminal negligence.' A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

INDICTMENT

The provision of the indictment on which Dr. Ketchum was convicted states:

> ". . . THE GRAND JURY OF THE COUNTY OF ERIE, by this indictment, accuse JESSE KETCHUM of the following crime:
>
> "Criminally Negligent Homicide, in that he, the said JESSE KETCHUM, on or about the 16th day of June, 1971, in the County, with criminal negligence, caused the death of Margaret Louise Smith by his choice of a surgical procedure, to wit: a vaginal hysterotomy, under all the circumstances

of this case and by failing to care for and provide for her proper medical care, after that procedure was utilized."

STATEMENT OF THE CASE

I. FACTS

From 1828 until July 1, 1970, the practice of induced abortion by a physician was illegal by statute in New York State, except where necessary to save the life of the pregnant woman.[1] This was the case in the overwhelming majority of American States during that time.[2] Authorities relied upon by this Court in *Roe* v. *Wade*, 410 U.S. 113, 149 n. 44 (1973), estimated that open legal abortion experience within hospitals and clinics in the 1960's was limited to perhaps 8,000 abortions per year,[3] as contrasted with about 4 million births.[4]

In other words, abortion experience was severely restricted until July 1, 1970, when the New York legislature passed a new law permitting elective abortion to be a matter between physician and patient.

The 1970 law, N.Y. PENAL CODE § 125.05, at 168 (McKinney Supp. 1974-1975), changed this and provided:

> " '. 'Justifiable abortional act.' An abortional act is justifiable when committed upon a female

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[1] *See* N.Y. Rev. Stat., pt. IV, c. I, tit. II, art. 1, § 9, at 661, and *id.*, tit. VI, § 21, at 694 (1829), cited in *Roe* v. *Wade*, 410 U.S. 113, 138 n. 31 (1973).

[2] *Roe* v. *Wade*, 410 U.S. at 139 & nn. 33-36.

[3] Tietze, United States: Therapeutic Abortions, 1963-1968, 59 Studies in Family Planning 5 (1970).

[4] *Id.*

> with her consent by a duly licensed physician . . . within twenty-four weeks from the commencement of her pregnancy."

The law permitted a physician to perform an abortion upon a patient prior to the 24th week. There was no requirement that the physician do the procedure in any particular kind of facility, such as a hospital or surgicenter.

The official Commentary to the statute pointed out that many States required hospitalization or residency, but that N.Y. PENAL CODE § 125.05 "contains neither hospital nor residence requirements." *Id.* at 169.

Similarly, New York courts periodically referred to this unambiguous fact:

> "Abortions were legalized in New York State in 1970 (Penal Code, § 125.05 [L.1970, ch. 127]) and outside New York City they may be performed in doctor's offices (*Robin v. Incorporated Vil. of Hempstead*, 30 N.Y.2d 347, 334 N.Y.S.2d 129, 285 N.E.2d 285." *People v. Dobbs Ferry Medical Pavillion*, 40 App. Div. 2d 324, —, 340 N.Y.S.2d 108, 110 (2d Dep't), *aff'd*, 33 N.Y.2d 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973).

During the first two years of legal abortion in New York, approximately 402,000 abortion patients were helped in New York City alone.[5]

Against this background Dr. Jesse Ketchum, with twenty-five years experience (R IV:2460) [6] as a board-

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[5] Pakter, Two Years Experience in New York City With the Liberalized Abortion Law—Progress and Problems, 63 Am. J. Pub. Health 524 (1973).

[6] All references are to the Record on Appeal in the New York Court of Appeals, *i.e.*, R I:100 = Volume I, page 100.

certified specialist in obstetrics and gynecology, began practicing in Buffalo, New York, in the professional medical building at 50 High Street across the street from Buffalo General Hospital (R II:689, 969).

In Buffalo Dr. Ketchum specialized in abortion practice. He received referrals from clergy, priests, ministers, and local physicians (R I:578).

The climate in Buffalo, however, was apparently not favorable to open, legal abortion practice outside of the hospital. Although abortion had been legal for a week, Dr. Ketchum was raided at his office on July 6, 1970, by the same police officers who investigated this case a year later. (R II:906, 908).

After the July 6, 1970, raid, Dr. Ketchum continued his medical practice. Then, on June 16, 1971, a patient Margaret Louise Smith expired after an abortion, and Dr. Ketchum was subsequently indicted for criminally negligent homicide, N.Y. PENAL CODE §§ 15.05, 125.10.

This case is the only known instance in which a physician has been prosecuted in connection with a death from a legal abortion. There were 29 deaths from 446,052 legal abortions in New York State from July 1, 1970, to June 30, 1972,[7] but no other physician was prosecuted.

Also, this is the only prosecution of a physician under the criminally negligent homicide statute since it was passed. The cases have typically been brought for drunken driving. See Annotations to N.Y. PENAL CODE §§ 15.05, 125.10.

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[7] Berger, Maternal Mortality Associated with Legal Abortion in New York State—July 1, 1970-June 30, 1972—43 Am. J. of Obst. & Gyn. 315 (1974).

Margaret Louise Smith came with her common law husband, Billy Ray Ellenburg, from Ypsilanti, Michigan, to Buffalo, New York, on the morning of June 16, 1971. Her abortion procedure was performed by Dr. Ketchum some time after 10 o'clock a.m. (R I:416).

One of Dr. Ketchum's assistants, Judith Hassett Nicosia, testified that "nothing was abnormal" (R I:512) when she checked on the patient around noon. On a subsequent routine check, however, she spoke to the patient and saw that there was "bleeding enough to worry me and to summon the doctor." (R I:516).

Dr. Ketchum "went immediately into the room with Margaret Smith. (*Id.*). He responded "instantaneously" when summoned. (R I:564).

Nonetheless, the patient's condition became such that Dr. Ketchum asked that the rescue squad be summoned to take her to the Buffalo General Hospital across the street. (R I:527). This was done, but the patient unfortunately expired and was pronounced dead on arrival.

By 5:45 p.m. Lt. Leo J. Donovan, Chief of Homicide, who had raided Dr. Ketchum the year before, was at the doctor's office with four other officers. (R III:901, 909). No *Miranda* warnings were given. (*Id.* at 902). The officers "secured" the offices (*Id.* at 850), took various charts and other items (*Id.* at 597-598), photographed the treatment room (*Id.* at 966), and questioned Dr. Ketchum. (*Id.* at 658, 670, 673, 675, 910, 954, 964).

That evening an autopsy was performed, with Lt. Donovan present. (R I:261).

A grand jury investigation and indictment followed.

At the trial Dr. Ketchum defended, through counsel and expert testimony, on several grounds.

First, the statute and indictment provided no fair notice of the conduct charged. As defined, criminally negligent homicide entails failure to perceive "a substantial and unjustifiable risk," N.Y. PENAL CODE § 15.05(4), that death will occur, and a "gross deviation" from a reasonable standard of care.

The indictment provided little further illumination. It charged Dr. Ketchum with performing a "vaginal hysterotomy" which was not the procedure shown by the autopsy at all, as appears more fully hereinafter.

The indictment also used the term: "under all the circumstances of this case." What circumstances? This provided the defense with utterly no warning whether fault was to be charged in regard to anesthesia, oxygen use, laboratory tests, intravenous liquids, or any other aspect of the clinic, Dr. Ketchum's practice, or his staff. A bill of particulars had been of no aid also.

Details of the prosecution's prima facie case did not begin to emerge clearly until the trial, and these continued to vary throughout the proceedings. They showed a very sharp dispute as to what happened the day the patient expired.

Apparently, the prosecution theorized that the patient had been more than 12 weeks pregnant (R I:58), that a vaginal hysterotomy procedure (*Id.* at 55) had been performed, that such a procedure was not standard in the local medical community (*Id.* at 61), that there were not but should have been blood or blood derivatives in Dr. Ketchum's clinic (*Id.* at 60), that during the operation there was a tear in the cervix

which was only partially sutured and from which the patient did bleed (*Id.* at 60), that Dr. Ketchum did not adequately locate the source of bleeding, that the patient expired as a consequence, and that the sum total came to criminally negligent homicide.

The defense was straightforward.

Counsel repeatedly attempted to ascertain the detailed basis of the criminal charges, all to no avail, as appears in the next section.

Expert testimony and medical texts were introduced to show that the medical procedure was not a "vaginal hysterotomy," but a simple D&C. (R III:1478, II:1059, II:755-756). As appears, the prosecution charged the wrong operative procedure.

Defense counsel repeatedly showed that there were no preexisting definite legal standards regarding the performance of abortions in New York in 1971. Indeed, the New York Court of Appeals held the only set of regulations unconstitutionally vague in *People v. Dobbs Ferry Medical Pavillion*, 33 N.Y. 2d 584, 347 N.Y.S. 2d 452, 301 N.E. 2d 435 (1973), before the trial of this case.

Estimations of the patient's pregnancy ranged from 12 to 20 weeks, according to the witness, and testimony showed the uncertainties in making such estimates. (R III:1488, 1502, II:1041).

By expert testimony and cross-examination of prosecution witnesses, defense counsel sought to establish that this had been a case of uncontrollable bleeding caused by amniotic fluid embolism. The medical details of this defense go beyond the scope of this Petition, but, briefly, such a cause of death is uncommon,

although not rare, and is beyond the physician's control. (R III:1693-1700, III:1500).

In lay terms, amniotic fluid is the waterlike substance in the sac which holds the fetus. If this fluid gets into the woman's bloodstream, it goes to the lungs and usually causes the blood to cease clotting. Death by uncontrollable bleeding over minutes or hours is the result (R III:1693-1696).

Two experts with background experience concerning amniotic fluid embolism testified that this was a cause of death here. (R III:1700, 1500). This was the logical explanation put forth by the defense, but which did not prevail.

Dr. Ketchum is at liberty on $10,000.00 bail pending disposition of this Petition. The sentence imposed was three years at Attica State Prison.

II. WHEN AND HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Defense counsel raised a Fourteenth Amendment claim of lack of notice in the statute and indictment throughout the proceedings below. Objections to individual and cumulative deprivations of a fair trial were also raised repeatedly and ruled upon adversely.

The affidavit of counsel supporting the first Motion to Dismiss Indictment (R IV:2489-2540) stated:

> "26) This indictment does nothing to inform us of what particular actions or instances of inaction on the part of the accused are being deemed criminal by the State." (*Id.* at 2498).

The trial judge denied this aspect of the motion with one conclusory paragraph. (*Id.* at 2773).

A second Motion to Dismiss Indictment (R IV:2780-2795), more specifically argued:

> "(a) The indictment and corresponding Bill of Particulars violate the defendant's rights to due process of law;
>
> "(b) The indictment is defective in that the statutes defining the crime charged are unconstitutional or otherwise invalid . . ." (*Id.* at 2780)

The supporting affidavit carefully analyzed the unconstitutional indefiniteness of the statute, indictment, and bill of particulars, repeatedly suggesting that Fourteenth Amendment standards were not being met. (*Id.* at 2781-2795, ¶¶ 7(a)-(f), 15-18, 23, 26, 27, 30, 31, 34, 35, 36, 37, 38, 39, 40, 52, 53, 54, 55, 56, 58, 59, 60).

Again the trial judge denied the motion stating simply: "[D]ue deliberation having been had thereon, the motion of the defendant is denied in all respects." (R IV:2798).

Immediately before the trial, defense counsel renewed the above motions, and they were denied. (R I:38). A defense request for a definition of a prima facie case was denied. (R I:51).

During the trial, defense counsel objected to the misconduct and rulings which are the subject of this appeal. Record citations appear, *infra*, where each point is outlined. Appendix B, *infra*, contains sections of the testimony of particular importance to the Federal constitutional and fair trial issues presented by this Petition.

At the close of the evidence, defense counsel renewed all motions, including those for a mistrial. (R IV: 2138). These were again denied. (*Id.* at 2148).

Objections to the prosecutor's inflammatory summation and further motions for mistrial were made at the end of summation. (R IV:2353). These were denied. (*Id.* at 2354).

Requests to charge and objections to the charge were all denied. (R IV:2413).

On the intermediate appeal to the Supreme Court, Appellate Division, Dr. Ketchum challenged the criminally negligent homicide statute as unconstitutionally applied to him. *Brief for Defendant-Appellant,* pp. 4-18, *People* v. *Ketchum,* — App. Div. 2d —, 358 N.Y.S. 2d 353 (4th Dep't 1974). Reliance was placed on numerous Fourteenth Amendment due process cases from this Court. *E. g., Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966); *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939).

Similarly, Dr. Ketchum argued to the Appellate Division that his constitutional right to a fair trial had been violated, citing numerous examples, including the cross-examination of his chief expert witness, Dr. Milan Vuitch, and the prosecutorial misconduct occurring on summation. *Brief for Defendant-Appellant,* pp. 18-36, *People* v. *Ketchum, supra.* Again, reliance was placed on important fair trial—due process decisions from this Court. *E. g., Napue* v. *Illinois,* 360 U.S. 264 (1959); *Krulewitch* v. *United States,* 336 U.S. 440 (1949).

Nonetheless, the Appellate Division affirmed without opinion. (App. A at 2a).

Leave was granted to appeal to the New York Court of Appeals, where Dr. Ketchum reiterated and strengthened his Federal constitutional arguments.

Further cases on lack of notice in the application of indefinite statutes were cited. *E. g., Smith* v. *Goguen,* 415 U.S. 566 (1974); *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972).

Similarly, Dr. Ketchum brought in the Fourteenth Amendment fair trial decisions cited above. The prosecution, it should be noted, relied heavily on *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974), which was a straightforward Fourteenth Amendment due process—fair trial case.

The opinion of the New York Court of Appeals, while not extended, (App. A at 1a), must have determined both sets of Fourteenth Amendment due process issues.

This was a case where decision of each Federal question "was necessary to the determination of the cause, and . . . the judgment as rendered could not have been given without it." *Brown* v. *Atwell,* 92 U.S. 327, 329 (1876).

The New York Court of Appeals expressly held that "the misconduct does not reflect a pattern throughout the trial . . ." *People* v. *Ketchum,* 35 N.Y. 2d —, 360 N.Y.S. 2d —, — N.E. 2d — (Oct. 23, 1974) (No. 419). This holding *must* entail a conclusion that the trial as a whole was not so unfair as to abridge the Fourteenth Amendment due process right to a fair trial. The point was briefed and argued.

Similarly, the New York Court of Appeals was squarely faced with a constitutional challenge to the application of the criminally negligent homicide statute, N. Y. Penal Code §§ 15.05, 125.10. The State argued that *People* v. *Haney,* 30 N.Y. 2d 328, 333 N.Y.S. 2d 403, 284 N.E. 2d 564 (1972), foreclosed this

issue. *Brief for Respondent,* pp. 22-24, *People* v. *Ketchum, supra.* The New York Court of Appeals apparently agreed, finding sufficient proof of guilt, which would not be pertinent if the statute as applied were regarded as constitutionally suspect.

If the constitutional basis of the New York Court of Appeals decision should appear unclear, it would be proper for this Court to grant the petition for certiorari, vacate the judgment, continue bail, and remand for a more specific constitutional determination, as was done in *Dep't of Motor Vehicles* v. *Rios,* 410 U.S. 425 (1973) (per curiam). Such a course may be more particularly warranted where, as here, there is no possibility of an independent and adequate state ground.

REASONS FOR GRANTING THE WRIT

The Court should review this case for three principal reasons.

Lack of Notice of Pre-Existing Legal Standards

First, the New York Courts upheld the conviction for criminally negligent homicide, although that statute had never before been applied in a medical context, the indictment and statute provided grossly insufficient notice of the conduct charged, there were no clearly defined pre-existing standards of medical practice in the abortion area, and there was no evidence on two essential elements of the offense.

The lack of fair notice and vagueness in the New York criminally negligent homicide statute affect important privacy and due process rights and raise substantial Federal constitutional questions at least as serious as those involved in numerous previous decisions by this Court. *E. g., Smith* v. *Goguen,* 415 U.S. 566 (1974); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966);

Giaccio v. *Pennsylvania* 382 U.S. 399 (1966); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921); *see generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

The criminal negligence statute, historically applied only in automobile accident cases, speaks of "fail[ure] to perceive a substantial and unjustifiable risk" and of "gross deviation from the standard of care that a reasonable person would observe in the situation." N. Y. PENAL CODE § 15.05. There is no reference to medical standards and how these standards are to be determined. That is the crux of this case. Unable to rely on pre-existing published legislative standards, the prosecution attempted to develop proof *during the trial* of supposed medical standards in an area where there had been very little medical experience to be incorporated *ex post facto* into the criminal code by the jury as it deliberated.

As more fully appears hereinafter, the case resulted in a flagrant Fourteenth Amendment due process violation because, as a matter of law, the statute, indictment, and testimony showed an elementary lack of fair notice and absence of pre-existing legal standards. Further, there was utterly no competent evidence on two essential elements of the offense as ultimately defined during the trial by the prosecution.

Impact on Roe v. Wade and Doe v. Bolton

Second, the conviction in this case must be overturned in order to prevent the emergence of unreasonably restrictive local standards in communities hostile to abortion and concomitant prosecutorial circumven-

tion of *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Abortion, like any other medical procedure, carries with it some risk of complications, and even death. The risk, however, is and has been found by this Court to be minimal. As *Roe* noted, "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." 410 U.S. at 149, n. 44.

Roe also pointed out that "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forego it, has largely disappeared." 410 U.S. at 149.

The *Roe* and *Doe* opinions stressed that the State could not impose a hospital or licensed facility requirement on the performance at least of first trimester abortions. *Roe*, 410 U.S. at 163; *Doe*, 410 U.S. at 194-195; *accord*, *Word* v. *Poelker*, 495 F.2d 1349, 1351-1352 (8th Cir. 1974); *Friendship Medical Center* v. *Chicago Bd. of Health*, — F.2d — (7th Cir., Oct. 30, 1974) (No. 74-1070); *Hodgson* v. *Anderson* 378 F. Supp. 1008, 1017 (D. Minn.) (three-judge court), *appeal docketed sub nom. Spannaus* v. *Hodgson*, 43 U.S. Law Week 3139 (U.S., Sept. 9, 1974) (No. 74-254); *Coe* v. *Gerstein*, 376 F. Supp. 695, 696 (S.D. Fla. 1973) (three-judge court).

With respect to early second trimester abortions, a State *may* but has no obligation to "adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish." *Doe*, 410 U.S. at 195.

However, the State of New York chose not to adopt any such standards. N.Y. PENAL CODE § 125.05.3. One effort to impose standards on abortion facilities was ruled out as unconstitutionally vague in *People* v. *Dobbs Ferry Medical Pavillion*, 33 N.Y. 2d 584, 347 N.Y.S. 2d 452, 301 N.E. 2d 435 (1973), prior to this trial. Physicians were accordingly free in 1971 to perform first or second trimester abortions in their hospitals, clinics, or offices, according to their best medical judgment.

The prosecution of Dr. Ketchum is an effort to invent standards where there were none before and to incorporate such standards *ex post facto* into a felony criminal statute. If the effort succeeds, any community hostile to abortion can define malpractice as restrictively as supporting testimony can be found, and prosecute any physician performing abortions for deviations from that standard. The net result will be to dilute *Roe* v. *Wade* and *Doe* v. *Bolton* to the point that patients seeking abortions and physicians willing to perform them are at the mercy of local community climate.

Grossly Unfair Trial

Third, the New York courts permitted repeated prosecutorial misconduct and trial irregularities far more serious than those recently discussed in *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974), *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), *Cool* v. *United States*, 409 U.S. 100 (1973), and *Webb* v. *Texas*, 409 U.S. 95 (1972).

The New York Court of Appeals agreed that there had been "grievous misconduct" (App. A at 1a) by the prosecution which that Court "strongly con-

demn[ed]." (*Id.*) However, the Court saw no "pattern throughout the trial," a conclusion to which Petitioner strenuously objects.

As more fully appears hereinafter, the trial was a model of calculated, systematic prosecutorial misconduct designed not to determine guilt or innocence but solely to *convict* a medical man for alleged conduct which neither he nor any other person could possibly have known might someday be a criminal offense.

The problem of prosecutorial and trial judge misconduct, moreover, is recurring, of national interest, and appropriate for careful, regular review by this Court. Commentary on the subject has been extensive.[8]

This particular case is a good example because it presents the cumulative impact of "grievous misconduct" throughout a trial.

I. THE COURT SHOULD REVIEW DR. KETCHUM'S FOURTEENTH AMENDMENT CLAIM THAT HE WAS DENIED DUE PROCESS BECAUSE THE CRIMINALLY NEGLIGENT HOMICIDE STATUTE, NEVER BEFORE APPLIED IN A MEDICAL CONTEXT, AND THE INDICTMENT, PROVIDED NO NOTICE OF THE CONDUCT CHARGED, NOR OF SPECIFIC PRE-EXISTING PROFESSIONAL STANDARDS, AND THERE WAS NO EVIDENCE ON TWO ESSENTIAL ELEMENTS OF THE OFFENSE.

Appeals involving claims of statutory vagueness come to this Court each Term. Many, as here, claim a Fourteenth Amendment violation in the manner a statute was applied.

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[8] *See, e.g.*, Note, The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case, 54 COLUM. L. REV. 946 (1954); Note, Prosecutorial Misconduct—Recent Second Circuit Cases, 2 HOFSTRA L. REV. 385 (1974); Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 TEXAS L. REV. 629 (1972).

While First Amendment vagueness claims have most often been reviewed, "[v]ague laws in any area suffer a constitutional infirmity. . . ." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966). The Court has not hesitated to rectify fundamental unfairness in the application of indefinite statutes or rules.

This case would be an excellent one for review because it involves the important issue of fair notice, the novel problem of criminal negligence, and the need to protect physicians from the imposition of unannounced community medical standards in the sensitive abortion context.

Lack of Notice in Statute

The criminally negligent homicide statute, attacked on its face, and as applied, is not a model of explicitness, even in the drunken driving context where it is almost always applied. Derived in part from the Model Penal Code, the statute has been widely criticized as not a defensible predicate for criminal liability. Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632 (1963).

Two principal ambiguities in the statute affect this case.

First, the definition for criminal law purposes of "the standard of care that a reasonable person would observe in the situation," N.Y. PENAL CODE § 15.05(4), in this context, provides no notice of any specific actions or inactions. Potentially, it allows, without warning, scrutiny of every step taken or every step which could have been taken by Dr. Ketchum on the day the patient expired.

Similarly, the definition of "gross deviation," N.Y. PENAL CODE § 15.05(4), is obscure.

In an area with evolving medical standards such as abortion, where community emotions cannot be excluded, a physician is at the mercy of a lay jury and any one or group of physicians hostile to him.

The decision of the New York Court of Appeals, upholding the statute as it had done before, is inconsistent with many Fourteenth Amendment due process cases from this Court.

For example, *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 404 (1966), struck down a statute allowing imposition of costs on an acquitted defendant who had been guilty of some undefined "misconduct," "reprehensible" conduct, or "improper" conduct. This was the type of law which

> "leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." 382 U.S. at 403.

In this case the jury was free to adopt any physician's opinion as to what constituted a proper medical standard, and a gross deviation therefrom, even though Dr. Ketchum had no advance warning of what that opinion would be, since there were no legislative regulations and those which did exist had been struck down as unconstitutionally vague in *People* v. *Dobbs Ferry Medical Pavillion*, 33 N.Y.2d 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973).

This Court has repeatedly held that:

> "[t] avoid the constitutional vice of vagueness, it is necessary, at a minimum that a statute give fair

notice that certain conduct is proscribed." *Rabe* v. *Washington*, 405 U.S. 313, 315 (1972).

Whereas in *Rabe* there was no fair notice that criminal liability depended upon the place a film was shown, here the statute had never even been applied in a medical setting and provided no notice of medical standards and how they were to be ascertained.

Review of this case and reversal are warranted on the above basis alone.

Lack of Notice in Indictment

While a specific indictment or prosecutor-drafted bill of particulars cannot cure an unconstitutional statute, it can worsen the fair notice problem. Here the indictment is open-ended, providing no notice of what is meant by "under all the circumstances of the case." This allowed the prosecutor to work out the standard of care and elements of the offense up to the eve of trial.

The definition of "vaginal hysterotomy" also developed to be a point of contention. Dr. Patterson, for the prosecution during his definition of "vaginal hysterotomy" acknowledged that: "I am describing the procedure, not what was in the pathology report." (R I: 1056). Dr. Ketchum, however, was prosecuted on the basis of the pathology report. If the procedure there described was not a vaginal hysterotomy, he was entitled to an acquittal!

Further, the indictment charged a failure to provide "proper medical care" after the operation. The specific recommended aftercare was not defined, nor did the indictment explain how the alleged failure of unspecified aftercare caused death. There never was a specification of errors or omissions of conduct.

In short, Dr. Ketchum went to trial without fair notice of the acts and/or omissions charged, nor of the specific standards by which he was to be judged.

The need to deter such fundamental deprivations of elementary due process warrants review by this Court.

Lack of Pre-Existing Legal Standards

The absence of prevailing legal standards is shown by numerous factors. The grand jury which indicted Dr. Ketchum itself concluded that there were no required legal standards pertaining to abortion in New York. The Conclusions from the September 15, 1972, Report of the Grand Jury are included in Appendix B, at 3a-4a, and are an admission against interest in view of the majority's explicit objection to "demand abortions," (App. B at 3a), or elective abortion as then legalized in New York.

The Grand Jury Report recommended the passage of "appropriate legislation which sets by law the proper medical guidelines, standards, and conditions under which abortions can be performed." (App. B at 16b). Such standards did not exist at that time under the law! The Grand Jury repeated that "no where in the law is the doctor *required* to perform his services in properly equipped clinics or hospitals, under strict sanitary conditions."

If that was the case, Dr. Ketchum should never have been indicted.

Dr. William E. Mosher, Commissioner of Health for Erie County, was called by the prosecution. He testified it was correct that "[e]ach physician was free to choose whatever procedure they decided was best at the

time in their office . . ." (R III:1120). Over objection (*Id.* at 1122) Dr. Mosher testified about the State Sanitary Code requirements, although the Code had been declared unconstitutionally vague as applied to abortion facilities. *People* v. *Dobbs Ferry Medical Pavillion, supra.*

Even though he was oblivious of the *Dobbs Ferry Case,* Dr. Mosher candidly acknowledged the absence of pre-existing legal standards for abortion practice in physicians' offices.

Again, the lack of standards requires an outright reversal. The Record is full of evidence, which this Court may and constitutionally should review which shows an absence of pre-existing, clearly defined legal standards for the medical practice of abortion.

Dobbs Ferry Case

The treatment by the New York Court of Appeals of abortion clinic regulations in *People* v. *Dobbs Ferry Medical Pavillion*, 33 N.Y.2d 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973), also shows the absence of reasonably ascertainable pre-existing medicolegal standards. *Dobbs Ferry* was not even mentioned in the opinions below although it showed as a matter of law an utter absence of clearly defined professional standards for the performance of abortions in facilities within New York.

The *Dobbs Ferry* case originated as a civil action by the Attorney General to enjoin the operation of an abortion clinic for purported violation of the New York Public Health Law. The People sought to define a physician group practice as a "hospital," requiring approval of the State Public Health Council

under N.Y. Public Health Law § 2801 and 10C N.Y. C.R.R. § 700.2[a](6), the State Hospital Code.

The New York Court of Appeals affirmed on July 3, 1973, an order of the Appellate Division, 40 App. Div. 2d 324, 340 N.Y.S.2d 108 (2d Dep't 1973), invalidating as unconstitutionally vague and overbroad the very definitions of "hospital," "facility," and "clinic," as applied to a group of physicians performing abortions in a group practice.

If the only statutes in New York regulating abortion facilities were unconstitutionally vague, how then could a physician such as Dr. Ketchum be held criminally responsible for the violation of those standards when combined with similarly vague notions as to what was and what was not acceptable medical practice?

Roe and Doe Show Shifting Medical Standards

The opinion of the Court in *Roe* v. *Wade*, 410 U.S. 113, 141-148 (1973), shows the extent to which medical standards in the abortion field have shifted rapidly in the short space of a few years.

Discussing the position of the American Medical Association, 410 U.S. at 141-144, the Court notes a transition from "general suppression" of abortion in the 19th century to a more permissive posture in 1967, allowing abortion for "health" reasons if "performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." 410 U.S. at 143. (The latter restriction, of course, was held unconstitutional in *Doe* v. *Bolton*, 410 U.S. 179, 193-195 (1973)).

Within the AMA, in 1970, *Roe* recalled, there were noted by its study committees a "polarization of the medical profession on this controversial issue; division among those who had testified; a difference of opinion

among AMA councils and committees; 'the remarkable shift in testimony' in six months . . . and a feeling 'that this trend will continue.' " 410 U.S. at 143.

The AMA picture, then, is one of shifting standards. A similar pattern was found within the American Public Health Association and the American Bar Association. *Roe* v. *Wade, supra* 410 U.S. at 144-47. While the mandatory hospitalization requirement of the 1962 MODEL PENAL CODE § 230.3(2), was accepted by many States and the American Law Institute, experience proved the restriction unnecessary and, ultimately, unconstitutional. *Doe* v. *Bolton, supra,* 410 U.S. at 193-195. The Commissioners on Uniform State Laws, by 1972, also decided not to mandate hospitalization for abortion patients. *Roe* v. *Wade, supra,* 410 U.S. at 146-47 & nn. 40-41.

The numerous briefs of *amici* before this Court in *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), further illuminate the often philosophically-based differences of opinion on acceptable medical standards in the abortion field.

While the Brief for *Amici Curiae American College of Obstetricians and Gynecologists et al.*, pp. 80-90, cited in *Doe* v. *Bolton,* 410 U.S. 179, 193 n.13 (1973), argued that abortion was a relatively safe medical procedure which should not be restricted to hospitals alone, sharply contrasting briefs were filed by other groups and physicians.

The *Motion and Brief Amicus Curiae of Certain Physicians, Professors, and Fellows of the American College of Obstetrics and Gynecology* [*sic*][9] *In support*

[9] The organization is correctly styled ACOG, the American College of Obstetricians and Gynecologists.

of Appellees, filed jointly in *Roe* v. *Wade* and *Doe* v. *Bolton* devoted 26 pages to a section, *id*, pp. 32-58, entitled "Medical Hazards of Legally Inducted Abortion." This Brief strongly opposed the position ultimately taken by the Court and went so far as to state: "The claim that abortion is X-times as safe as childbirth is a fabrication invented to sell abortion." *Id.* at p.45.

It is beyond the scope of this Petition to demonstrate why the Court correctly invalidated laws mandating hospitalization for all abortion patients. The pertinent point for this case is that notions of acceptable medical practice for the performance of abortions do vary widely and have changed greatly in recent years. A physician such as Dr. Ketchum should not be left to the mercy of local physicians' standards when a jury could adopt testimony directly at odds with the national constitutional standards enunciated in *Roe* v. *Wade* and *Doe* v. *Bolton*.

No Evidence on Essential Elements of Offense

A further basis for review is that the People produced no competent evidence whatever on two essential elements of the offense.

This Court has repeatedly held that " 'a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process.' " *Vachon* v. *New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam). See also *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

In *Vachon*, *supra*, a conviction was overturned for the absence of any evidence that the appellant had

personally sold or caused to be sold to a minor a certain button.

Here there was utterly no competent evidence on two essential elements of the offense of criminally negligent homicide, N.Y. PENAL CODE §§15.05, 125.10, as further explicated by the indictment.

No Evidence of "Vaginal Hysterotomy"

The indictment charged that Dr. Ketchum had chosen to do an operation called a "vaginal hysterotomy." There was no proof of that charge. The prosecution named the wrong operation as much as if they had charged an abortion done by removing the appendix.

A "vaginal hysterotomy," by definition, requires, *inter alia*, an incision into the uterus, from which the fetus is removed. (R III:1478). Dr. Vuitch, who had been trained in vaginal surgery at Vienna and had performed several dozen such procedures (*Id.* at 1575), explained the procedure, its elements, and that the pathology report simply showed no evidence of a vaginal hysterotomy. (*Id.* at 1478). He explained correctly that his description coincided with that in all the medical texts. (*Id.* at 1482).

The indictment error was that a vaginal hysterotomy does not include an incision in the cervix, but rather in the uterus, which is a different organ. In short, the prosecution was trying Dr. Ketchum for something he never did. *Cf. Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948).

Dr. Patterson, testifying for the People, admitted in his definition of vaginal hysterotomy that: "I am describing the procedure, not what was in the pathology

report." (R II:1056). In other words, he was describing what Dr. Ketchum was indicted for, not what he did! Neither Dr. Patterson (*Id.* at 1005) nor Dr. Gopelrud (R I:829) had ever performed a vaginal hysterotomy in any event.

The defense suggested that the tear in the uterus resulted from the use of packing forceps while inserting a gauze pack to stop bleeding. That is why the tear was concentrated down in the cervix rather than up in the uterus.

In sum, there was no evidence, as a matter of law, that a vaginal hysterotomy was performed. A conviction based upon no evidence on an element of the offense violates due process. *Vachon* v. *New Hampshire, supra.*[10]

No Evidence of "Gross Deviation"

The prosecution did not establish pre-existing legal standards by which Dr. Ketchum could guide his medical practice, as discussed above. It follows that no "gross deviation" from such standards could be established, as required by N.Y. PENAL CODE § 15.05(4).

No effort, indeed, was even made to quantify the extent of departure from those standards the prosecution attempted to develop during the course of the trial.

All that emerged from the testimony was that certain medical experts, who had never done a vaginal hysterotomy, thought it was dangerous and more complicated than necessary. They thought all second tri-

[10] If one were to assume the contrary, then the Fourteenth Amendment would surely require that Dr. Ketchum be notified in some way that vaginal hysterotomies were illegal in New York.

mester abortions should be done in a hospital, a ·gh this was not the law.

There was no testimony to the *extent* of danger when contrasted, for example, with childbirth as in *Roe* v. *Wade*, 410 U.S. 113, 149 & n. 44 (1973).

In sum, there was no evidence from which to conclude that a "gross deviation" from acceptable medical standards had occurred.

II. THE COURT SHOULD REVIEW DR. KETCHUM'S FOURTEENTH AMENDMENT CLAIM THAT HE WAS DENIED A FAIR TRIAL BECAUSE THE PROSECUTION FOR CRIMINAL NEGLIGENCE IN PERFORMING A LEGAL ABORTION RESULTING IN DEATH WAS PERMEATED WITH IMPROPRIETIES AND ERROR WHICH EVEN THE COURT OF APPEALS RECOGNIZED AS INCLUDING "GRIEVOUS MISCONDUCT" TO BE "STRONGLY CONDEMN[ED]."

In each recent Term this Court has reviewed several cases involving claims that a defendant was denied a fair trial. Such cases involve claimed violations of specific provisions within the Bill of Rights, *e.g., Griffin* v. *California*, 380 U.S. 609 (1965), trials which are alleged to have been generally unfair, *e.g., Chambers* v. *Mississippi*, 410 U.S. 284 (1973), or, as here, a combined claim that specific fundamental rights were abridged and that the trial as a whole was fundamentally unfair.

Misconduct Much More Serious Than in Donnelly v. DeChristoforo

In the New York courts the People relied heavily on *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974), as sanctioning even more serious prosecutorial misconduct than that involved here. *Donnelly*, however, is not an invitation to the type of "grievous misconduct" which the New York Court of Appeals found

below. Indeed, this is precisely the variety of case to which the Court vowed not to extend the *Donnelly* rationale.

The Court in *Donnelly* dealt solely with "two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury." 416 U.S. at 640. One, "the expression of a personal opinion as to guilt," 416 U.S. at 640, was found improper, but not a denial of due process.

A second, "more serious" remark was a suggestion that the defendant and his counsel " 'hope[d] that you [the jury would] find him [defendant] guilty of something a little less than first-degree murder.' " 416 U.S. at 640. One interpretation of this remark was that the defendant may have sought to plead guilty to a lesser offense, and thereby admitted some guilt.

This Court found the "more serious" remark improper but not a denial of due process because (1) "[c]onflicting inferences," 416 U.S. at 643, could have been and in fact were drawn from the remark, and (2) the remark "was but one moment in an extended trial and was followed by specific disapproving instructions." 416 U.S. at 634.

By contrast, the present case involves numerous unambiguous instances of prosecutorial misconduct and trial error which permeated the entirety of the pretrial and of the trial.

C. Cross-Examination of Principal Expert Defense Witness Concerning Alleged Criminal Abortion Convictions Which Did Not Occur and Would in Any Event Have Been Constitutionally Irrelevant After Doe v. Wade and Doe v. Bolton.

As the Court stated, reversing a conviction in *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973):

> "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."

In this case Dr. Ketchum's right to call witnesses was seriously abridged by the treatment of his chief medical expert witness, Dr. Milan Vuitch of Washington, D.C., who had been involved in *United States* v. *Vuitch*, 402 U.S. 62 (1971).

This was undoubtedly one of the "examples of grievous misconduct by the prosecution in cross examination" (App. A at 1a) referred to by the Court of Appeals.

Dr. Vuitch was called as the primary defense medical expert concerning the central questions in the case. The direct testimony of Dr. Vuitch had been highly favorable to Dr. Ketchum and, if accepted, would unquestionably have required a verdict of not guilty. (R III:1473-1509).

To prevent this, the prosecutor set out to destroy Dr. Vuitch in the eyes of the jury in a manner highly offensive to fair trial due process concepts embodied in the Fourteenth Amendment.

This "grievous misconduct" interferred with Dr. Ketchum's "right to offer testimony," *In re Oliver*, 333 U.S. 257 (1948), and right "to call witnesses in [his] own behalf," *Chambers* v. *Mississippi*, 410 U.S.

284, 294 (1973), in a manner far more serious than that in the *Chambers* case.

On direct examination it was shown that Dr. Vuitch had impressive qualifications and experience, both in Europe and in the United States (R III:1473-1477). He was board-certified, had 34 years of surgical experience, and particularly had been trained in vaginal surgery.

Dr. Vuitch carefully explained precisely why the medical reports conclusively showed no evidence of a vaginal hysterotomy. (R III:1478-1482). He explained how, when, why and where the tear probably took place. (R III:1491-1496). He went over his own experience with amniotic fluid embolisms. He concluded from the medical photographs that the deceased patient had probably been from 12 to 14 weeks pregnant (R III:1502), a borderline first trimester case.

On cross-examination the prosecutor wasted no time in committing reversible error.

First, Mr. Cleary stated:

> Q. *As has Dr. Ketchum,* you have had *troubles with the law* because of abortions, haven't you? (R III:1514) (Emphasis added).

Then Mr. Cleary asked:

> Q. Have you been convicted, Doctor, for illegal abortions?" (R III:1514).

Before time for an objection, Dr. Vuitch acknowledged that he had been indicted. (*Id.*).

Defense counsel objected repeatedly and moved for a mistrial. (*Id.*). The trial court denied the motion without explanation, and briefly told the jury to disre-

gard the line of questioning. The entirety of that testimony appears in Appendix B hereto, at 4a-6a.

The foregoing is equalled, but not excelled in the prosecutorial misconduct throughout the trial. It is reversible error in more than one respect.

The prosecutor knew or should have know the reported litigation history of Dr. Vuitch, and that in fact all of the charges were disposed of, leaving no convictions.

United States v. *Vuitch*, 305 F.Supp. 1035 (D.D.C. 1969), *modified*, 402 U.S. 62 (1971), *indictment dismissed*, Crim. No. 1460-70 (D.D.C. Nov. 4, 1971), was a major case in this Court as was *Vuitch* v. *Hardy*, 473 F.2d 1370 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973). At least the prosecutor should have been aware of those cases, which had been fully reported long before questioning.

It is unthinkable to allow a prosecutor to ignore published decisions from this Court, while requiring the Petitioner to defend himself on a charge of violating totally unpublished, indefinite, medical standards.

The fact of indictment or, indeed, conviction on illegal abortion charges was utterly irrelevant and highly prejudicial. Even a conviction would be inadmissible since *Roe* v. *Wade*, 410 U.S. 113 (1973), is the classic type of case to be applied retroactively. This has been done in the Second and Fourth Circuits. *United States ex rel Williams* v. *Preiser*, — F.2d — (2d Cir.), *cert. denied*, 43 U.S. Law Week 3331 (U.S. Dec. 9, 1974) (No. 74-78); *Vuitch* v. *Hardy*, 473 F.2d 1370 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973).

Here the prosecutor portrayed the chief defense medical expert as a multiple criminal offender when, in fact, any conduct had been constitutionally privileged

This was seriously aggravated by the insulting manner in which the prosecutor referred to the witness: Below are some examples:

> "I am thankful you are in the District of Columbia." (R III:1531)
>
> "We all didn't come from Vienna, Doctor." (*Id.* at 1526).
>
> "But he is wrong and you are right from way down in Washington, D. C." (*Id.* at 1624).
>
> "We all have the distinctive impression of how well you like yourself." (*Id.* at 1630).

The prosecutor suggested further that Dr. Vuitch openly ignored the law before *Roe* v. *Wade* (R III: 1519), and performed abortions for any reason. (*Id.* at 1518).

During summation, the prosecutor characterized Dr. Vuitch as "[t]he Viennese sausage maker . . ." (R IV:2334) and "an arrogant self proclaimed king of the abortionists . . . coming here for nothing but to protect somebody else who may be looking for his record." (*Id.*)

This language, tasteless in any forum, is an outrageous violation of civilized courtroom standards. It is a gross appeal to regional and ethnic bigotry. In isolation or taken with other trial misconduct, it shows reversible error.

Verbal Abuse of Dr. Ketchum

The abuse of Dr. Vuitch was only exceeded by that which the prosecutor reserved for the defendant, Dr. Ketchum.

In summation the prosecutor represented that "in the case of Dr. Ketchum the abortions were not removed from the back alleys, from the hotel rooms . . . ." (R IV:2269-70).

Repeatedly Dr. Ketchum was accused of practicing medicine solely for financial gain:

> ". . . [H]e has got to clear that table to put somebody else on it and to get another five hundred bucks." (*Id.* at 2293).
>
> ". . . [T]hat is why Ketchum performs this kind of procedure, it is simply money. You don't have to do many of them at $500 a copy each day to understand the kind of money that you and I don't even dream about." (*Id.* at 2295).

Similarly, the prosecutor made insistent appeals to local and regional prejudice:

> ". . . [H]e moves here like some carpetbagging charlatan with his little black bag . . . ." (*Id.* at 2294).
>
> ". . . the out of state carpetbagging physician who came in here." (*Id.* at 2301).
>
> "The carpetbagger himself . . . ." (*Id.* at 2318).

Those outrageous remarks, reminiscent of appeals to racial prejudice in another era, could not have been harmless. If a prosecutor can get by with the remarks made above, there are no limits to the extent of "grievous misconduct" the New York Court of Appeals will sanction.

CONCLUSIONS

Petitioner has a Federal constitutional right not to be prosecuted unless his conduct was proscribed by pre-existing standards of law as to which he had fair notice, and unless evidence of each element of the offense was shown.

Petitioner further has a constitutional right under the Fourteenth Amendment to a fair trial before an impartial judge and jury.

These important rights were denied in the courts below.

This Petition presents two substantial Federal questions of importance to the maintenance of civilized Fourteenth Amendment standards. The Court should grant review.

Respectfully submitted:

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APPENDIX

APPENDIX A

**Memorandum of the New York Court of Appeals,
People v. Jesse Ketchum, No. 419,
October 23, 1974**

STATE OF NEW YORK
COURT OF APPEALS

No. 419

THE PEOPLE &c., *Respondent,*

v.

JESSE KETCHUM, *Appellant.*

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

The order appealed from should be affirmed.

The record discloses examples of grievous misconduct by the prosecution in cross examination and summation which we strongly condemn. However, since the overwhelming proof is all but conclusive of defendant's guilt, and the misconduct does not reflect a pattern throughout the trial, but rather reactions at certain times of stress, reversal is not warranted.

* * * * *

Order affirmed in a memorandum. Concur: Breitel, Ch. J., Gabrielli, Jones, Wachtler, Rabin and Stevens, JJ.

Memorandum of the Supreme Court of New York, Appellate Division, Fourth Department, People v. Jesse Ketchum, — App. Div. 2d —, 358 N.Y.S.2d 353 (4th Dep't, June 27, 1974)

PEOPLE of the State of New York, *Respondent,*

v.

Jesse KETCHUM, *Appellant.*

Supreme Court, Appellate Division, Fourth Department. June 27, 1974. Raichle, Banning, Weiss & Halpern, Frank G. Raichle, Buffalo, for appellant. Edward C. Cosgrove, Dist. Attorney, Judith Blake Manzella, Buffalo, for respondent. Judgment unanimously affirmed. (Appeal from Judgment of Erie Supreme Court, Marshall, J., convicting defendant of Criminally Negligent Homicide.) Present: MARSH, P. J., and WITMER, SIMONS, GOLDMAN and DEL VECCHIO, JJ.

Judgment of Conviction Appealed From

THE PEOPLE,

v.

JESSE KETCHUM.

OCT 26 1973 Frederick Marshall, J. S. C. Dan Pearson, Stenog. E. Carey Cantwell, Asst. D. A. Roy Carlisi, Counsel for deft. moves to set aside the verdict as being inconsistent with the verdict and against the weight of the evidence. Motion denied.

The Court sets bail at $10,000.00.

ORDERED AND ADJUDGED, that the defendant be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of 3 years and the defendant be committed to the custody of the State Department of Correction and he shall be delivered to the Attica Correctional

Facility at Attica, New York, there to be dealt with in accordance with the laws pertaining to his sentence.

Oct 26 1973 Order staying judgment pending appeal.

APPENDIX B—EXCERPTS FROM RECORD

Conclusions From September 15, 1972 Report of the December, 1971 Grand Jury of the County of Erie Proposing Recommendations for Legislative Action in the Public Interest Pursuant to Section 125.05-3 of the Criminal Procedure Laws and Regulations for the State of New York

The entire body of the Grand Jury with all 17 voting members in total and harmonious agreement most strongly recommend that the Legislature of the State of New York take immediate steps to pass appropriate legislation which sets by law the proper medical guidelines, standards and conditions under which abortions can be performed.

This position is not meant in any way to compromise the majority's position against demand abortions but only to protect women who are being aborted while the present law is in effect.

The discovery that the only condition placed upon a justifiable abortional act is that it be performed on a consenting female by a duly licensed physician outraged the sensibilities of this body. For we have discovered that no where in the law is the doctor *required* to perform his services in properly equipped clinics or hospitals under strict sanitary conditions.

Indeed this Statute as it now stands unassisted and unimplemented by legally legislated medical standards and guidelines, did not in fact remove abortions from dingy, unequipped and unsanitary hotel rooms but simply made those places legally acceptable operating rooms.

Any duly licensed physician who so chooses can now turn any office, hotel room or even a garage into an operation amphitheater running patients through an assembly line fashion with little or no preparation and absolutely no after care, because the law does not require him to follow generally acceptable medical standards.

Serious abortional surgery can be performed in a room or office which has no equipment at all other than a scalpel, a curette, sutures and a needle. No blood, no trained personnel, no proper after care facilities, little or nothing are presently required by law.

We therefore strongly urge the Legislature of this State to rectify that frightening oversight and legislate into law proper medical standards and guidelines along the lines of those recommended by the New York Medical Association to all of its members. These guidelines must be backed up not simply by the request or suggestion of the Medical Association of New York but by the mandates of proper statute under this State Public Health Law. Attached hereto and made a part of the recommendation of this Grand Jury is a copy of those guidelines.

The Grand Jury respectfully requests that an Order be made and entered accepting and filing this report as a public record; further that the District Attorney be authorized and directed to transmit copies of this report to members of the New York State Legislature, the members of the Court of Appeals of the State of New York, and any other official having a proper interest in this report.

* * * * *

Milan Vuitch for Defendant, Cross. [1514]

A. General and gyn surgery, that is my specialty.

Q. As has Dr. Ketchum, you have had troubles with the law because of abortions, haven't you?

MR. CARLISI: I object to the question and ask to have it stricken and the court instruct the jurors not to consider that as evidence.

THE COURT: The jury will disregard it.

MR. CARLISI: I move for a mistrial at this time.

THE COURT: Motion denied.

MR. CARLISI: Exception.

THE COURT: You are not to consider that in any way, members of the jury.

BY MR. CLEARY:

Q. Have you been convicted, Doctor, for illegal abortions? A. I was indicted 16 times.

Q. For performing illegal abortions, right? A. I was instrumental in legalization of the abortion surgery in the United States, as you know very well, Mr. Attorney.

Q. I understand that, Doctor. You have been convicted, have you not, for illegal abortions? A. That conviction was ei ased by the Federal Court.

Q. You are still not answering my question, Doctor. [1515]

MR. CARLISI: I object.

MR. CLEARY: I would appreciate it if you would.

MR. CARLISI: I am going to continually object to this whole line of questioning.

THE WITNESS: Yes, I was convicted in the lower courts.

MR. CARLISI: This is irrelevant, immaterial and highly prejudicial to the defense. If you continue allowing this type of questioning I ask the court to allow the doctor to explain the fact that the Supreme Court of the United States vindicated him and overruled and overturned every one of those decisions.

The Court: Wait a minute, counsel. You are saying two things. We are talking about two things. We are talking about convictions first of all and convictions are proper to impeach the credibility of the witness.

MR. CARLISI: I'm not so sure, your Honor. If I may be heard for a moment, I'm not sure the doctor understands that an overturned reversed case on the part of a higher court indicates—

THE COURT: Are you saying that his convictions were [1516] reversed?

MR. CARLISI: Yes, sir.
THE COURT: By a higher court?
MR. CARLISI: Yes, sir.
THE COURT: His convictions were erased?
MR. CARLISI: He has no convictions.
THE COURT: Why doesn't he say that?
THE WITNESS: I am not legally trained, your Honor.
MR. CARLISI: He is a physician.
THE COURT: He knows whether or not there was a reversal of a conviction. Were you ever convicted and was that conviction reversed? Is that what you are telling us.
THE WITNESS: Yes.
THE COURT: Then you have never been convicted.
THE WITNES: That's correct.

BY MR. CLEARY:

Q. Now then, Doctor, at this time you are professionally performing abortions, is that correct? A. That's right. 80 percent of my practice or 75 percent of my practice are therapeutic abortions.

Q. You keep using the term therapeutic abortion. A. That's correct.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-741

JESSE KETCHUM,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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JESSE KETCHUM,

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THE PEOPLE OF THE STATE OF NEW YORK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The judgment of conviction entered against the petitioner in the New York Supreme Court, Erie County, on October 26th, 1973 (unreported; entered on jury verdict) was unanimously affirmed, without opinion, by the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, on June 27th, 1974, reported at 45 A.D.2d 820. The memorandum of the the New York State Court of Appeals, unanimously affirming the order of the intermediate appellate court, is reported at 35 N.Y.2d 740 (October 23rd, 1974).

Jurisdiction

Jurisdiction is sought by petitioner pursuant to Title 28, United States Code, Section 1257, Subdivisions 2 and 3. The order and judgment of the New York State Court of Appeals, the highest state court in which review may be obtained, was entered on October 23rd, 1974. There was no indication that the constitutional issues raised on this petition for certiorari were considered by that court. While objection was made to cross examination of a defense witness, and specific objections were addressed to the prosecutor's summation, it was never asserted that the errors complained of were of constitutional dimension until the matter reached the state appellate court. No motion was made or granted to amend the remittitur to indicate that a question under the Constitution of the United States was necessarily passed upon by the New York State courts.

The petition for a writ of certiorari was docketed in the Supreme Court of the United States on December 12th, 1974. The typewritten petition was received by the office of the District Attorney of Erie County on December 16th, 1974; printed petitions were received on December 20th, 1974.

Questions Presented

1. Where the statute in question has been defined in specific terms, and where the criminal behavior proscribed is couched in language adjudicated to be readily understandable through common usage and historical precedent, and where the proof presented at trial established that the death occurred through the employment of an unacceptable surgical procedure, at an unacceptable time, in unacceptable circumstances and through total failure to provide obviously necessary medical assistance, was there a constitu-

tionally permissible application of that statute to this petitioner?

2. Where the decision of the state court was clearly correct, based upon an interpretation of the facts presented at trial, is it unnecessary for this Court to review the decision which turned on its own unique facts and would affect few litigants other than the instant petitioner?

3. Should this Court refuse to exercise jurisdiction with reference to errors claimed to have occurred on cross examination and summation where petitioner failed to object to those errors on constitutional grounds and, thus, has not discharged his burden of proving that the state court determined that issue on constitutional grounds?

Statement of the Case

The petitioner was indicted by an Erie County Court Grand Jury on January 27th, 1972 charged, in two counts, with Manslaughter in the Second Degree and Criminally Negligent Homicide. After arraignment, motions to dismiss the Indictment on the grounds that it was fatally defective in form and content and based upon defective Grand Jury proceedings, for suppression of scientific reports and evidence, to determine if electronic surveillance was utilized, and for material favorable to the defense, were made and determined. A further motion to dismiss the Indictment on the ground, *inter alia*, that the statute defining the crime charged was unconstitutional, was denied, as was a motion to suppress physical evidence. A motion for Bill of Particulars, requesting a description of the precise circumstances and elements alleged to constitute reckless or criminally negligent conduct, was granted. Such Bill of Particulars was supplied. Motion to suppress petitioner's oral statements was denied after a hearing.

Trial of the Indictment commenced on September 5th, 1973 and continued through October 3rd, 1973, when the jury returned its verdict finding petitioner not guilty of Manslaughter in the Second Degree, as charged in the first count of the Indictment, and guilty of Criminally Negligent Homicide, as charged in the second count. The petitioner was sentenced, on October 26th, 1973, to an indeterminate term of imprisonment not to exceed three years.

On appeal to the Supreme Court, Appellate Division, Fourth Judicial Department, the judgment of conviction was unanimously affirmed, without opinion. That order of affirmance was unanimously affirmed by the Court of Appeals.

Petitioner was released on bail at arraignment; execution of sentence has been stayed pending determination of this petition.

Facts

Petitioner's conviction arose out of the following facts:

Margaret Louise Smith was from fifteen to twenty-four weeks pregnant (166, 167, 206, 497, 1148)[1] when she came to Buffalo in June, 1971, to terminate her pregnancy by abortion (404). Billy Ray Ellenburg, with whom she had lived for a year and one-half, accompanied her to petitioner's office at nine-thirty a.m. on June 16th (419). He paid five hundred dollars, in advance, for the abortion (417).

When Ellenburg returned to petitioner's office at noon, he found Mrs. Smith alone in a room, covered with a bloody blanket (419, 423). There were puddles of blood on the

[1] Numerals in parentheses refer to pages of the Record on Appeal to the New York Court of Appeals.

floor and all over her legs (424). In the thirty or forty minutes that he was there, the bleeding continued and blood poured off the bed (425). He was assured by the receptionist that the profuse bleeding was normal; petitioner did not enter the room (426).

Ellenburg saw Mrs. Smith again at two p.m. She was much paler, spoke weakly, had difficulty breathing, and was very hot (429, 452). Ellenburg demanded petitioner's presence in that room; petitioner said that Mrs. Smith was alright; Ellenburg next saw her when the Rescue Squad brought her out of the office (431, 432).

The receptionist, JUDITH HASSETT, testified that she was employed by petitioner for three weeks as of June 16th, 1971 (459, 460). Her duties were to keep the office clean, answer the telephone, book appointments, and give the patients a form to complete when they arrived (459, 461). She was never instructed to check on pulse or blood pressure after an operation and she did not know the symptoms of shock (467, 468). She had no medical or nursing training (460). It was her duty to take money from patients, which she placed on the sheet in the patient's clinic room (469).

Mrs. Hassett said that Mrs. Smith complained of back pains when she entered the room with Ellenburg (516). Mrs. Hassett changed the bloody sheet under the patient (518, 519). There was blood on the sheet covering Mrs. Smith and there was blood on the table, dripping to the floor (523). The patient was bleeding to an extent that worried Mrs. Hassett, who summoned petitioner (516). He was busy (517). Mrs. Hassett, then called petitioner's wife into the room. Mrs. Ketchum then summoned petitioner immediately. He finally came into the room (517, 518). Shortly thereafter petitioner stuck his head out and shouted

for Mrs. Hassett to get the Rescue Squad as fast as possible (527).

There were no signs of life in Mrs. Smith when the Rescue Squad arrived (604). No tracheotomy had been performed; there was no blood supply or intravenous feeding; petitioner's oxygen tanks were empty (605, 612, 648). Mrs. Smith was pronounced dead on arrival at Buffalo General Hospital.

Police witnesses who investigated this matter testified to the bloody condition of the room from which Mrs. Smith had been taken: blood was apparent on the floor and walls, dripping from the table which was still covered with the bloody sheet (862, 868, 896). Petitioner informed the police that her heart stopped while he was performing the operation (850, 871-872, 875-876, 890, 953). He had not administered any blood (954).

Expert medical testimony established that the victim suffered a through and through tear in the whole cervix and lower part of the uterus, extending into the broad ligament (1141-1143). There was a surgical cut; the tear resulted from pressure on the uterus from the head of the fetus in the area of least resistance, *i.e.*, where it was cut (1146). The cut was sutured, but the tear was not (1150). Margaret Louise Smith bled to death from this tear in the uterus and cervix (1159, 1279, 309, 767). The damage done to her body would cause death in two to ten hours (1156); if the tear had been recognized, her life would have been saved easily, by performance of a hysterectomy through abdominal incision (1157-1158).

There was testimony that petitioner told the Erie County Medical Examiner that he had performed a vaginal hysterotomy on Mrs. Smith, completed at ten thirty a.m., consisting

of an incision in her cervix and manual extraction of the fetus (359).

The bulk of the prosecution testimony consisted of proof that the abortional procedure used by petitioner was medically improper, that the pregnancy was too far advanced to be aborted in an office, that the procedure used was a major surgical procedure that should not have been performed in an office, and that the great danger of excessive bleeding following this particular abortional procedure required careful after-care, which was totally lacking in the instant case.

It was established that while the *legislature* did not set standards for abortion surgery, medical standards did exist for proper performance of abortion. There was testimony that vaginal hysterotomony is a surgical procedure (373) that is contraindicated after twelve weeks of pregnancy (385-387). No surgical procedure of abortion should be performed outside of a hospital (387). Vaginal hysterotomy is a totally unacceptable procedure in modern obstetries (1366-1367, 1384). It is a procedure of historical interest, mentioned in textbooks only to condemn it (763). According to medical standards in Erie County, New York State and the entire United States, only abdominal hysterotomy, saline injection or hysterectomy in a hospital are available operations past the first trimester of pregnancy (758, 759, 761, 762, 1016, 1018). Obstetrical and gynecological standards forbid the performance of abortion, by any method, outside of a hospital after twelve weeks of pregnancy because of the danger of an incision tearing and being difficult to see, resulting in great danger of hemmorrhage (760, 1114).

Medical standards of proper after-care were established on this record. Close observation is required for any signs of bleeding, by the physician or a specially trained nurse (774, 1035, 1021), as well as frequent periodic checks on blood pressure, pulse rate, respiratory rate, urine output and other vital signs (775, 1368, 1370, 1035, 1021). Visual flow of blood at noon (following a morning operation) would be highly significant (777); reasonable standards would dictate immediate preparation for transfer of the patient to a fully equipped hospital and the start of intravenous fluids, medication to contract the uterus, and administration of a blood substitute (1370, 1371). The ultimate requirement would be replacement of the lost blood and stoppage of the flow of blood (778). Petitioner's conduct was not a reasonable and prudent doctor's method of operation (784, 785).

The thrust of the defense proof was that neither vaginal hysterotomy nor any major surgery was performed on the victim (1478, 1503, 1720, 1724). Contrary to the prosecution proof that Mrs. Smith slowly bled to death in the absence of any curative action by petitioner, a defense theory was advanced that she died of an amniotic fluid embolism (1500, 1701, 1903). One defense doctor said that this is an emergency condition beyond the control of the physician (1500, 1501); another did not believe that the death was an instantaneous catastrophic event that occurred within one to thirty minutes (1865). Still another defense witness opined that one of a number of possibilities of death was hemorrhagic diathesis of intravascular coagulation, with or without amniotic fluid (1969, 2004).

REASONS FOR OPPOSING THE WRIT

POINT ONE

Section 125.10, Penal Law, was constitutionally applied to petitioner.

Although petitioner attempts to raise the question of the constitutionality of Section 125.10, on its face, that issue was not argued in the state courts (Appellant's Brief to Court of Appeals, page 4; Appellant's Reply Brief, pages 2-3). That statute, in conjunction with Section 15.10(4), New York Penal Law, survives a challenge to its constitutionality on the ground of vagueness in that the term "criminal negligence" is understandable through common usage and historical adjudication (*People v. Angelo*, 246 N.Y. 451; *People v. Eckert*, 2 N.Y.2d 126); it employs words well enough known to those within its reach to correctly apply them (*Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502); there is a well-settled common law meaning, notwithstanding an element of degree in definition as to which estimates might differ (*Nash v. United States*, 229 U.S. 373, 376). The constitutionality of the statute has been upheld by New York State courts, in a manner not inconsistent with the rulings of this Court (*People v. Haney*, 30 N.Y.2d 328; *People v. Kealey*, 33 N.Y.2d 818, cert. den. 415 U.S. 920).

Petitioner's repeated references to application of the statute to "drunk driving" cases are irrelevant to the disposition of this matter. The statute is not directed exclusively against vehicular homicides; it has been applied in diverse fact situations; see, *e.g.*, *People v. Henson*, 33 N.Y.2d 63 (battered child syndrome). In any case, the question not having been presented for decision to the New York Court of Appeals, there was no federal question of the

constitutionality of the statute on its face which is preserved for review by this Court (*Honeyman v. Hanan*, 300 U.S. 14).

Insofar as the question of the constitutionality of Section 125.10, as applied to this petitioner, was raised in the state courts, it is not clear that a definite issue of the validity of that statute was decided. Rather, the argument was based on the *construction* of the statute: whether the Indictment and Bill of Particulars, when read together, adequately apprised the petitioner of the crime with which he was charged; whether sufficient testimony was presented at trial to constitute the elements of the crime charged. Indeed, it is this basic fact question that is still being argued on this petition. Respondent, therefore, objects to review of the determination of the New York Court of Appeals on this issue on the ground that the question of the construction of a state statute is not a federal question (*Louisville & N.R. Co. v. City of Louisville*, 166 U.S. 709; *Honeyman v. Hanan*, *supra*). At the very least, the state decision could have rested on a question of the construction of the statute rather than on its validity. There being that possibility, and there being no showing to the contrary, this Court is without jurisdiction to review the state determination (*Stembridge v. State of Georgia*, 343 U.S. 541, 547; *Bachtel v. Wilson*, 204 U.S. 36; *Southwestern Bell Tel. Co. v. State of Oklahoma*, 303 U.S. 206, 212, 213).

In the alternative, if the New York courts decided a constitutional question, that question was properly decided. The Indictment itself was sufficient to inform the petitioner of the conduct deemed criminal, in that it was couched in the language of the statute, which has been held constitutional, as amplified by specific verbiage on the face of the Indictment and more specific information contained in the Bill of

Particulars and minutes of testimony before the Grand Jury. The argument, at the trial level, was not that the specific conduct was unknown, but that it was difficult to isolate in the face of a voluminous quantity of testimony (2794, paragraphs 55, 56).

The argument, that this record lacks proof of pre-existing standards for the performance of an abortion, is without merit, and belied by the record. While it is true that no statute details the proper method of any surgical procedure, this record is replete with proof of *medical* standards, existing at the time of the operation in issue, which were grossly violated by petitioner. No statute exists which details the factual elements necessary to sustain a charge of vehicular homicide or which establishes the precise degree of negligence which renders one culpable in the death of an infant. The law need not be so precisely drafted so long as proof exists in a given case of standards of reasonable behavior. Such proof exists in large measure on this record. There is a volume of medical testimony establishing the medical and surgical standards existing in Erie County, New York State and the *entire United States* (761, 762), not only for abortion, but for surgical procedures as a whole. The proof that this petitioner utilized a surgical procedure that was condemned by medical authorities on two continents establishes the lack of danger of this petitioner having been left to the mercy of local physicians. Additionally, proof of the complete inappropriateness of this operation at the stage of gestation and under the conditions existing was uncontraverted: the chief defense witness did not perform vaginal hysterotomies after the first trimester of pregnancy; he would not perform a post-thirteen week abortion in an office (1575, 1576, 1573).

And more than improper procedure at an improper time in an improper setting was shown: no witness on this trial could countenance the total and absolute lack of after-care of the patient. No vital signs were checked and no notice was taken of profuse and visible blood loss. No one was even minimally trained in this basic and primary requirement. This petitioner stands convicted, not because he performed an abortion, not because of hostile competing doctors, not because of an emotional community, but because he performed a surgical procedure fraught with danger and, when the obvious danger was manifest, he allowed this young woman to bleed to death. Can it seriously be argued that there is no proof on this record of gross deviation from acceptable medical standards? There is proof on this record of gross deviation from the most basic human standards.

Finally, the argument that no vaginal hysterotomy was performed is not worthy of this Court's cognizance as it is a pure question of fact: defense doctors Vuitch and Petty said there was no vaginal hysterotomy; the petitioner himself admitted that he performed a vaginal hysterotomy; prosecution witnesses were satisfied that a vaginal hysterotomy had been performed (1478, 1720, 359, 763). Resolution of this issue was for the trier of fact: it is not of constitutional dimension.

POINT TWO

No error, reviewable by this Court, occurred through the conduct of the prosecutor.

a. No reviewable error occurred in summation.

There was objection raised to the prosecutor's summation immediately upon its conclusion. Objection, and motion for mistrial, was taken to five specific statements (2353-2354). Only one of the statements was pursued in the appellate process, *i.e.*, the prosecutor's reference to the law having been changed because of petitioner's incident.[2] While other allegations of error might have been considered by the intermediate appellate court, in the exercise of its plenary powers, it was procedurally impermissible for the New York Court of Appeals to have considered any error other than that specifically objected to on trial (*People v. Broady*, 5 N.Y.2d 500, 514; *People v. James*, 24 A.D.2d 608, aff'd 17 N.Y.2d 552; *People v. Gitlow*, 195 App. Div. 773, 798, aff'd 234 N.Y. 132, aff'd 268 U.S. 652; *People v. Hartigan*, 210 N.Y. 144, 148; *People v. Pindar*, 210 N.Y. 191). It must be assumed, therefore, that the New York Court of Appeals confronted only the single allegation of error in summation that was preserved for its review. That single error is not sufficient to require review by this Court.

Respondent concedes that the prosecutor misspoke, at 2294, when he quoted Dr. Mosher as saying that "even as a result of that", *i.e.*, petitioner's performance of abortions in an office, "the law was changed." This is, however, the only reference on this voluminous record, *by the prosecutor*, to a change in the law resulting from petitioner's actions.

[2] Other allegations of error were raised in the appellate courts, but these had not been objected to at trial.

It was defense counsel who not only raised the fact of a change in the law, but it was he who connected the change to the date of this crime: in cross examining Dr. Mosher, defense counsel asked if the situation—of abortions in offices—wasn't rectified *after June, 1971* by the passage of a Sanitation Code (1120); see, also, 1120, 803, 804, 805. The prosecutor made no attempt to show a change in the law to have a bearing on petitioner's conduct. It does not appear that this single misstatement had any profound influence on the jury.

It is significant that the prosecutor went to some length to caution the jury that the law prohibiting abortions had been changed, emphasizing that petitioner was *not* being tried because he performed an abortion (2267-2268).

Further, and most important, there was no objection, *on constitutional grounds*, to any part of the prosecutor's summation (2352-2354). This want of proper presentation of a constitutional issue buttresses Respondent's position that the state decision sought to be reviewed did not rest on a constitutional basis. It is respectfully submitted, then, that this Court is without jurisdiction to consider the issue (*Bailey v. Anderson*, 326 U.S. 203, 207; *Street v. New York*, 394 U.S. 576, 581-582).

b. No reviewable error occurred on cross examination.

A lengthy and searching cross examination of Dr. Milan Vuitch, a defense witness, was conducted by the prosecutor following Dr. Vuitch's testimony that no vaginal hysterotomy had been performed, contrary to petitioner's admission, and that vaginal hysterotomy was a perfectly good operation, contrary to the opinions of American and British medical authorities. The prosecutor attempted to discredit the testimony of this witness—long the accepted purpose of

cross examination. Respondent is unaware of any rule prohibiting an attempt to impeach the credibility of a witness and does not equate such an attempt with a deprivation of a defendant's right to call witnesses in his own behalf.

Respondent vigorously asserts that the exchange with the witness, cited as error, was not occasioned by the prosecutor. It was precipitated by the perfectly proper question, "Have you been convicted, Doctor, for illegal abortions?" (1514). It was the witness who answered that he had been indicted, and spoke of erasure and conviction. It was defense counsel who spoke of irrelevance, overruling, vindication and convictions. It was defense counsel who finally asserted that the witness' convictions were reversed. Nowhere on this record does it appear that the witness had not been *convicted*. Respondent cannot accept responsibility for actual or constructive knowledge of the litigation history of a defense witness where it is very apparent that defense counsel had no knowledge. There is nothing on this record to indicate bad faith on the part of the prosecutor; defense ignorance of the background of its own witness cannot be imputed to the prosecution.

Any error which may have been occasioned by this line of questioning was vitiated by the trial court's instruction to the jury that the witness had no convictions (1516), based upon his belief that any convictions had been reversed. It was further vitiated by the testimony of Vuitch, *to which no objection was taken*, that he was performing abortions when it was illegal to do so (1520, 1476). The question of the retroactivity of the decisions of this Court concerning abortion is in no way raised on this record.

Further, no objection on *constitutional grounds,* was taken to any part of the cross examination by the prosecutor (1514-1516). The record does not disclose any basis for objection to the question, "As had Dr. Ketchum, you have had troubles with the law because of abortions, haven't you?" (1514), or even the portion of the question to which objection was made. The record does disclose that objection to questioning about a prior conviction was taken on the ground that it was, ". . . irrelevant, immaterial and highly prejudicial to the defense." (1515). Such objection falls far short of alerting the trial court to the presence of an issue of constitutional dimension. Again, this want of proper presentation of a constitutional issue forecloses review by this Court (*Bailey v. Anderson, supra; Street v. New York, supra*).

c. No "abuse" occurred at this trial.

It is contended before this Court that the prosecutor "verbally abused" the petitioner in that he commented on financial aspects of petitioner's practice and referred to him as a "carpetbagger". Not one of these comments was objected to at trial, on any basis. This alone is sufficient to remove the issue from the interest of this Court.

Additionally, contrary to the opinion expressed in the instant petition, these remarks were neither outrageous nor reminiscent of appeals to racial prejudice. The remarks were supported by the distasteful testimony on the record. Objection to "carpetbagger" is based upon a totally unfounded assertion of local prejudice: three of the prosecution witnesses were from Michigan, Ohio and Virginia; it was defense counsel who raised the claim that New York doctors don't like out-of-state doctors coming in and putting them out of business (2227).

The remarks now complained of were not sufficient to effect the verdict; they were not even sufficient to create objection at the trial. There having been no objection, there was no basis for review by the New York Court of Appeals, and no necessity for or propriety of review by this Court.

Conclusion

There was no quarrel on this trial with the legality of the abortion performed by petitioner. There was no attempt in this case to restrict the performance of abortions, to legislate, *ex post facto*, the manner and method of abortional surgery, to circumvent the rulings of this Court. The petitioner was held culpable for failing to perceive the risk of a woman bleeding to death following a surgical procedure destined to create such a risk and in the absence of the most minimal precautions against such result. He was found culpable under a statute proscribing such conduct in terms that could hardly be clearer if drafted in language identical to the proof against him. Any man must know that it is unacceptable to society to create the risk here involved and do absolutely nothing about it.

The petitioner was found guilty of the crime upon proof beyond any reasonable doubt. The trial was lengthy and not perfect, but it was a fair trial. Errors occurring on that trial were precipitated by the defense team and/or were not of sufficient magnitude to warrant objection.

The New York Court of Appeals properly upheld the affirmed conviction entered against this petitioner. That determination was sufficiently based on non-federal grounds so as not to require the invocation of this Court's jurisdiction. Insofar as a question of the constitutionality

of the statute, as applied to this petitioner, may have been decided, it was decided correctly and in a manner consistent with the decisions of this Court. If it was decided, it was a decision based upon the unique facts of the instant case, not likely to have wide effect.

Determination of the fairness of the trial was clearly decided on a non-federal basis, for at no time at trial did the few objections preserved for appellate review rise to constitutional dimension.

The Writ of Certiorari applied for should be denied.

Respectfully submitted,

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